83-880

No. _____

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IN THE

Supreme Court of the United States

October Term, 1983

RAYMOND JOHNSON,
Defendant-Appellant,

vs.

JEFF SCHERMERHORN and PERRY SCHERMERHORN,
Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether the Minnesota Long-Arm Statute, Minn. Stat. §543.19(1), as applied to appellant, violates the due process clause of the Fourteenth Amendment of the United States Constitution. In this case the Minnesota courts ruled that the Minnesota Long-Arm Statute permitted exercise of personal jurisdiction over appellant, a North Dakota resident, in the face of unrebutted affidavits filed by appellant establishing a total lack of contact with Minnesota.

2. Contained within the foregoing question is the issue of whether it violates the due process clause of the Fourteenth Amendment for Minnesota courts, under Minn. Stat. §543.19(1), to exercise personal jurisdiction over appellant, a nonresident defendant, solely on the basis of allegations of personal jurisdiction in the Complaint, where appellant submitted unrebutted affidavits establishing a complete lack of contacts with Minnesota. This subsidiary question draws into issue the constitutionality, as applied, of Rule 12.02 of the Minnesota Rules of Civil Procedure.

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Plaintiffs-Appellees.

JURISDICTIONAL STATEMENT

REPORTS

The opinion of the Minnesota Supreme Court is reported at 337 N.W.2d 692 (Minn. 1983). The Memorandum of the district court is unreported.

GROUNDS UPON WHICH JURISDICTION IS INVOKED

This is an appeal from a decision of the Minnesota Supreme Court upholding the exercise of personal jurisdiction by the Minnesota courts over appellant, a North Dakota resident, in the face of appellant's federal constitutional challenge to that exercise. The Minnesota Supreme Court issued its ruling on August 26, 1983. A timely notice of appeal was filed on November 10, 1983, with the

Minnesota Supreme Court. A timely amended notice of appeal was filed with the Minnesota Supreme Court on November 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2). In addition, the following cases support the exercise of the Court's appellate jurisdiction:

Cohen v. California, 403 U.S. 15, 17-18 (1971);
Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 61 n.3 (1963);
Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921).

The following cases apply to the Court's exercise of appellate jurisdiction over the second question presented:

In re Griffiths, 413 U.S. 717 (1973);
Mayer v. City of Chicago, 404 U.S. 189 (1971);
Lathrop v. Donohue, 367 U.S. 820 (1961).

Because the decision of the Minnesota Supreme Court sustained the exercise of personal jurisdiction over appellant, the decision was final for the purposes of the federal question presented even though the case was remanded by the Minnesota Supreme Court for trial on the merits. *See North Dakota Pharmacy Board v. Snyder's Stores*, 414 U.S. 156, 159-64 (1973). That is because the principal claim made by appellant is that the due process clause of the federal constitution is violated by being forced to go through a trial on the merits in Minnesota where there was no prima facie evidentiary showing of personal jurisdiction to rebut his affidavits demonstrating a lack of minimum contacts with Minnesota. The Court has recognized cases in this posture to be final. *See, e.g., World-Wide Volkswagon*

v. Woodson, 444 U.S. 286 (1980). Moreover, the issue presented is one capable of repetition, yet evading review, because it will always be mooted if a trial is held. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949).

PROVISIONS INVOLVED

Minnesota Statutes §543.19(1):

> Subdivision 1. As to a cause of action arising from any acts enumerated in this subdivision, a court of this state with jurisdiction of the subject matter may exercise personal jurisdiction over any foreign corporation or any non-resident individual, or his personal representative, in the same manner as if it were a state. This section applies if, in person or through an agent, the foreign corporation or non-resident individual:
>
> (a) Owns, uses, or possesses any real or personal property situated in this state, or
>
> (b) Transacts any business within the state, or
>
> (c) Commits any act in Minnesota causing injury or property damage, or
>
> (d) Commits any act outside Minnesota causing injury or property damage in Minnesota, subject to the following exceptions when no jurisdiction shall be found:
>
> (1) Minnesota has no substantial interest in providing a forum; or
>
> (2) the burden placed on the defendant by being brought under the state's jurisdiction would violate fairness and substantial justice; or
>
> (3) the cause of action lies in defamation or privacy.

Minnesota Rule of Civil Procedure 12.02:

> "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; (4) insufficiency of service of process; (5) failure to state a claim upon which relief can be granted; and (6) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

STATEMENT OF THE CASE

Appellant is a North Dakota farmer. He lent money to a friend, Loren Nogosek, who purchased an airplane with the money. Mr. Johnson's name was then included on the certificate of title to indicate his security interest in the airplane. Mr. Nogosek later sold the plane to plaintiffs-appel-

lees Jeff and Perry Schermerhorn. The sale occurred in North Dakota, and the Schermerhorns flew the plane to Minnesota. Sometime later the plane crashed, apparently injuring both of the Schermerhorns.

The Schermerhorns then brought an action in Becker County District Court, Minnesota, against Mr. Johnson and four other defendants. They invoked personal jurisdiction over Mr. Johnson under the Minnesota Long-Arm Statute, Minn. Stat. §543.19(1). That statute provides in relevant part that the state of Minnesota may exercise personal jurisdiction over a nonresident who:

> "Commits any act outside Minnesota causing injury or property damage in Minnesota. . . ."

Mr. Johnson promptly moved to dismiss for lack of personal jurisdiction, supported by his personal affidavit containing the following statements:

1. "I, Raymond Johnson, defendant in this action, am a resident and citizen of the State of North Dakota.
2. I own no property in the State of Minnesota.
3. I have never had an ownership interest in the airplane that is the subject of plaintiff's complaint. I did have a mortgage on the airplane, which was reflected in my name being on the certificate of title. However, I had no authority to negotiate or sell the plane to the plaintiffs at any time.
4. In connection with the sale of the plane, my role was limited to showing it to the plaintiffs when they came to North Dakota to see it. I did this solely as a favor to Loren Nogosek and was not personally or financially involved in the sale of the aircraft. I engaged in no negotiations with plaintiffs about the

airplane in North Dakota or anywhere else, and I never visited Minnesota or had any contact whatsoever with that state in connection with the sale of this airplane.

5. I have never had any contact with the plaintiffs of any nature or form, whether in person or by telephone or by letter, in the State of Minnesota."

Appendix at A-7 to A-8. Loren Nogosek's affidavit corroborated these statements:

> "I have read the affidavit submitted by Raymond Johnson in connection with his motion to dismiss for lack of personal jurisdiction and the statements made in it are true to the best of my knowledge and belief."

Appendix at A-8 to A-9.

Mr. Johnson's motion to dismiss for lack of personal jurisdiction also argued, citing *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), that to the extent that personal jurisdiction could be exercised under Minn. Stat. §543.19 (1), the statute would violate the due process clause of the Fourteenth Amendment.

The Schermerhorns did not contest any of the statements made in the two affidavits submitted by Mr. Johnson. Instead, they filed one affidavit claiming only that Mr. Johnson "showed" them the airplane once at his farm in North Dakota and told them that it was in "good condition":

1. That approximately one week before the Schermerhorns bought the airplane from Mr. Johnson, a phone call was made to Mr. Johnson to see if he would be home on a Sunday and if he would show them the aircraft. Perry Schermerhorn, Jeff Schermerhorn, and Gene Schermerhorn drove out to his farm in North Dakota. Mr. Johnson apparently was

not home, but someone, a relative or workman unknown to the affiant, showed them the aircraft on Mr. Johnson's farm.

2. On the following Wednesday, Jeff Schermerhorn and Perry Schermerhorn then went out and again met at the Johnson farm, this time with Mr. Johnson and Mr. Nogosak. Mr. Johnson then took Perry Schermerhorn up in the aircraft to show him how it worked and that it was in actual running condition.
3. While they were in the aircraft and when they were on the downwind leg before landing, Perry Schermerhorn asked Mr. Johnson if the aircraft was in good condition and whether or not it was airworthy. Mr. Johnson assured him that everything was all right and it was airworthy.

Affidavit of Perry Schermerhorn, Appendix at A-9 to A-10. In addition, the attorney for the Schermerhorns brought the certificate of title transfer to the hearing on the motion to dismiss, which listed Mr. Johnson's name on it, in addition to that of Mr. Nogosek.

The state trial court denied the motion to dismiss for lack of personal jurisdiction. The court's Memorandum Order reasoned as follows:

1. That if the plaintiffs do prove their allegations, the same would show the commitment of an act outside the State of Minnesota causing injury or property damage in Minnesota.
2. That Minnesota should have a substantial interest in providing a forum.
3. That the action is against other defendants who are residents of the State and the State should have an interest in providing a forum between all of the parties.

4. That the burden placed on the defendant is very small, if any. That the defendant lives only approximately 150 miles from Detroit Lakes, Minnesota, the county seat of Becker County wherein the trial would take place. That it would be unfair and not just to plaintiff if required to try the lawsuit in the State of Minnesota and then to again bring the same lawsuit in the State of North Dakota against Raymond Johnson, defendant.

Appendix at A-6. In so ruling the trial court failed to exercise the discretion it had under Minn. R. Civ. Pro. 56.06 to continue the motion in order to permit the Schermerhorns to engage in any discovery needed to ascertain jurisdictional facts.

Mr. Johnson appealed to the Minnesota Supreme Court. Again, he argued that the facts presented by the affidavits indicated the absence of personal jurisdiction over him. Alternatively, he argued that the Minnesota Long-Arm Statute was unconstitutional as applied under the due process clause of the Fourteenth Amendment. The other four defendants in the litigation were not parties to the appeal.

In an opinion issued August 26, 1983, the Minnesota Supreme Court sustained the trial court's exercise of personal jurisdiction. It ruled that in reviewing motions to dismiss under Rule 12.02 of the Minnesota Rules of Civil Procedure, "allegations in the complaint must be taken as true." Appendix at A-4, *quoting Hunt v. Nevada State Bank*, 285 Minn. 77, 82, 172 N.W.2d 292, 296 (1969).[1] The court then reasoned that:

> "at this juncture, we take as true that defendant Raymond Johnson was a co-owner of the plane with de-

[1]The district court did not cite Rule 12.02 of the Minnesota Rules of Civil Procedure in its decision. This provision emerged for the first time in the Minnesota Supreme Court's opinion.

> fendant Loren Nogosek, who at relevant times was a Minnesota resident, and that the negotiations for the sale of the airplane to Minnesota plaintiffs were initiated by defendant Johnson's co-owner in Minnesota. This case is unlike the car dealer in WorldWide Volkswagen who indiscriminately sells cars that are likely to find their way to any place in the country. Here the plaintiffs have alleged facts that, if true, show that defendant Johnson purposely availed himself, through his co-owner, of the privilege of conducting activities within Minnesota. It may be that at trial plaintiffs will not be able to prove their allegations of the requisite minimal contacts with Minnesota, but they must be given that opportunity; the trial court was correct in denying the motion to dismiss."

Appendix at A-4. (emphasis added).

The Minnesota Supreme Court thus ruled that Mr. Johnson must go through a full trial on the merits in Minnesota, notwithstanding his unrebutted affidavits indicating a complete lack of contacts with Minnesota. Mere allegations in the Complaint, according to the Minnesota Supreme Court, are sufficient to provide personal jurisdiction, at least until after a full trial on the merits.

THE SUBSTANTIALITY OF THE FEDERAL QUESTION PRESENTED

In *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), the Court ruled that in order to subject a defendant to the personal jurisdiction of a foreign forum, the defendant must have certain minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. Although the holding was couched in terms of due process limitations on

subjecting a defendant to a judgment *in personam* in a foreign forum, an important consideration in the Court's opinion was the question of when contacts

> "with the state of the forum [are sufficient to] make it reasonable in the context of our federal system of government to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal business is relevant in this consideration."

326 U.S. at 317. The Court thus recognized that due process protects a defendant from more than just the possibility of a judgment against him or her in a foreign forum. It also protects a prospective defendant from the inconvenience and cost of litigating in a foreign forum.

This theme has been carried through all of the Court's decisions on personal jurisdiction. Most recently, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Court discussed the minimum contacts requirement of *International Shoe* as performing two related functions:

> "It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.
>
> The protection against inconvenient litigation is typically described in terms of "reasonableness" or "fairness." We have said that the defendant's contacts with the forum State must be such that maintenance of the suit "does not offend 'traditional motions of fair play and substantial justice.' " The relationship between the defendant and the forum must be such that it is "rea-

> sonable . . . to require the corporation to defend the particular suit which is brough there."

444 U.S. at 292 (citations omitted).

International Shoe, World-Wide Volkswagen, and other personal jurisdiction cases of the Court make it clear that the due process clause of the Fourteenth Amendment requires at least a prima facie showing of personal jurisdiction before a defendant can be forced to litigate in a foreign forum. If unsupported allegations in a Complaint are sufficient to overcome a factual showing of no personal jurisdiction, the protection afforded by the due process clause would be nugatory. A litigant can always plead personal jurisdiction in a conclusory manner, especially given the liberalized pleading rules of the federal courts and most of the state courts.[5]

Because of these considerations, numerous courts are in square conflict with the Minnesota Supreme Court on this issue. *Baldridge v. McPike, Inc.*, 466 F.2d 65, 68 (10th Cir. 1972); *Chem Lab Products, Inc. v. Stepanek*, 554 F.2d 371 (9th Cir. 1977); *Commercial Ins. Co. of Newark v. Pacific-Peru Constr.*, 558 F.2d 948, 955 (9th Cir. 1977); *Taylor v. Portland Paramount Corp.*, 383 F.2d 634 (9th Cir. 1967); *Block Industries v. DHJ Industries, Inc.*, 495 F.2d 256, 259 (8th Cir. 1974); *Lehigh Valley Industries v. Birenbaum*, 527 F.2d 87, 92 (2d Cir. 1975); *Escade Cruz v. Ortho Pharmaceutual Corp.*, 619 F.2d 902, 906-08 (1st Cir. 1980); *Lamarr v. Klein*, 35 A.D.2d 248, 250, 315 N.Y.S.2d 695, 697 (1st Dep't 1970), aff'd mem., 30 N.Y.

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[5]Moreover, it is not unfair to force the individual contending that personal jurisdiction exists to support that contention with a minimum amount of evidence. Limited discovery for this purpose is available both under the federal rules, F.R. Civ. Pro. 56(f), the Minnesota rules, Minn. R. Civ. Pro. 56.06, and the rules of the other states.

2d 757, 333 N.Y.S.2d 421, 289 N.E.2d 576 (1972); *Chemical Bank v. World Hockey Association*, 403 F.Supp. 1374, 1379 (S.D.N.Y. 1975); *Merkel Associates, Inc. v. Bellofram Corp.*, 437 F.Supp. 612, 617 (W.D.N.Y. 1977). Indeed, the Minnesota Supreme Court appears to stand alone in its view that mere allegations of personal jurisdiction in the pleadings are sufficient to overcome a factual showing of lack of jurisdiction, at least until after a trial on the merits.

Although the Court has not directly addressed this issue in a personal jurisdiction context, it has ruled that where subject matter jurisdiction is challenged, the party asserting jurisdiction must bear the burden of proof. *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178 (1936). In *McNutt*, the Court construed this burden as entailing more than simply making allegations in the pleadings sufficient to establish jurisdiction. The Court stated that:

> "the limitations of [the court's] jurisdiction precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof."

298 U.S. at 189.

This appeal presents the question of whether the reasoning of *McNutt* should be extended to cover challenges to personal jurisdiction. This case also presents, so to speak, the other shoe of *International Shoe*. In that case the Court ruled that it was unconstitutional to subject a defendant to a judgment in a foreign forum without sufficient contacts to establish personal jurisdiction. This case presents the

parallel question of whether due process also requires a minimum evidentiary showing before an individual can be forced to undergo the cost and inconvenience of litigating on the merits in a foreign forum. The Minnesota Supreme Court is apparently the only court to refuse to provide due process clause protection in that context. The case thus raises a substantial federal question where there is also a jurisdictional conflict. Appellant respectfully requests the Court to note probable jurisdiction over this appeal.

Respectfully submitted,

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APPENDIX

Becker County

Endorsed
Filed August 26, 1983
Wayne Tschimperle, Clerk
Minnesota Supreme Court

JEFF SCHERMERHORN and PERRY SCHERMERHORN,

Respondents,

vs. C2-82-1509

B. H. HOILAND, etc, et al.,

Defendants,

RAYMOND JOHNSON,

Appellant.

SYLLABUS

Denial of a motion to dismiss for lack of personal jurisdiction over a defendant nonresident was proper where plaintiffs have alleged facts which, if true, are sufficient to establish the minimum constitutional contacts of the defendant nonresident with Minnesota.

Affirmed.

Considered and decided by the court en banc without oral argument.

OPINION

SIMONETT, Justice.

A North Dakota resident appeals from the order of the District Court of Becker County denying his motion to dismiss a Minnesota personal injury action against him for lack of personal jurisdiction. We affirm.

Plaintiffs Jeff and Perry Schermerhorn allege in their complaint that they are residents of Becker County, Minnesota; that pursuant to negotiations begun in Becker County, they purchased an airplane from defendants Raymond Johnson and Loren Nogosek, the owners of the plane, relying on representations by both defendants that the airplane was airworthy; that the plane was purchased on August 30, 1979, and crashed in Becker County on September 5, 1979, injurying both plaintiffs. The complaint further alleges that defendant Raymond Johnson is a resident of North Dakota and that defendant Loren Nogosek "formerly lived in Detroit Lakes, MN but is now a resident of Stanley, North Dakota." Several other defendants, all Minnesota residents, were also sued.

Defendant-appellant Raymond Johnson moved to dismiss the complaint against him for lack of personal jurisdiction. Johnson filed his affidavit stating that he never had any contact with plaintiffs in Minnesota in connection with the sale. He admitted his name appeared in the title certificate for the airplane as a co-owner with Loren Nogosek, but denied any ownership interest in the plane. He said his name on the title certificate reflected "a mortgage on the airplane"; that as a favor to Nogosek he showed the plane to plaintiffs in North Dakota; that the sale took place in North Dakota; and that he, Johnson, "was not personally or financially involved in the sale of the aircraft."

The trial court denied the motion to dismiss, stating in its memorandum, "[t]hat if the plaintiffs do prove their allegations, the same would show the commitment of an act outside the State of Minnesota causing injury or property damage in Minnesota." The court further reasoned that Minnesota has a substantial interest in providing a forum for all the parties, and that, since defendant Johnson lives only 150 miles from Detroit Lakes, the burden of having him attend trial in Becker County is slight.

Defendant-appellant Johnson contends that the trial court simply applied the literal language of our long arm statute, Minn. Stat. § 543.19 (1982), and failed to consider the constitutional requirement that the non-resident have "minimum contacts" with the forum state before long arm jurisdiction may be imposed. In other words, the issue presented here is whether plaintiffs have made a showing of sufficient minimum contacts so that our long arm statute may be applied to defendant-appellant Johnson.

Appellant argues that the trial court's ruling mentions no contacts and that, in fact, he had no contacts with Minnesota. There is no need here to discuss again the implications of *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), as we have already done this in *Dent-Air, Inc. v. Beech Mountain Air Service, Inc.*, 332 N.W.2d 904 (Minn. 1983), and most recently in *West American Insurance Co. v. Westlin, Inc.*, — N.W.2d — (Minn., filed August 26, 1983) It is enough to note, as appellant argues here, that Minnesota's interest in providing a forum is not a "contact" which establishes personal jurisdiction, nor is trial convenience, nor is the "foreseeability" that the airplane is likely to find its way into Minnesota.

Having said this, we nevertheless hold that, in the pres-

ent posture of this case, defendant-appellant Johnson has the requisite "minimum contacts" with Minnesota to afford personal jurisdiction over him under our long arm statute.

"It is clear that in reviewing the granting of motions [to dismiss] founded upon Rule 12(b), Federal Rules of Civil Procedure, the model for our Rule 12.02, allegations in the complaint must be taken as true." *Hunt v. Nevada State Bank*, 285 Minn. 77, 82, 172 N.W.2d 292, 296 (1969); *see also Marquette National Bank of Minneapolis v. Norris*, 270 N.W.2d 290 (Minn. 1978). In other words, at this juncture, we take as true that defendant Raymond Johnson was a co-owner of the plane with defendant Loren Nogosek, who at relevant times was a Minnesota resident, and that the negotiations for the sale of the airplane to Minnesota plaintiffs were initiated by defendant Johnson's co-owner in Minnesota. This case is unlike the car dealer in *World-Wide Volkswagen* who indiscriminately sells cars that are likely to find their way to any place in the country. Here the plaintiffs have alleged facts that, if true, show that defendant Johnson purposely availed himself, through his co-owner, of the privilege of conducting activities within Minnesota. It may be that at trial plaintiffs will not be able to prove their allegations of the requisite minimal contacts with Minnesota, but they must be given that opportunity; the trial court was correct in denying the motion to dismiss.

Affirmed.

STATE OF MINNESOTA
County of Becker

IN DISTRICT COURT
Seventh Judicial District

JEFF SCHERMERHORN and PERRY SCHERMERHORN,

Plaintiffs,

vs.

B. H. HOILAND, d/b/a HOILAND AVIATION, MARK EDWIN SHOUGH, RAYMOND JOHNSON, LOREN NOGOSEK, a/k/a LOREN NOGOSAK, and BEMIDJI AVIATION SERVICE,

Defendants.

ORDER

The above entitled matter came on before the Court in the chambers of the Court on the 12th day of October, 1982 pursuant to a motion made by Vogel, Brantner, Kelly, Knutson, Weir & Bye, Ltd., attorneys for Raymond Johnson.

R. W. Irvine, attorney for the plaintiffs, appeared in opposition to the motion.

The motion was brought by defendant Raymond Johnson for an order dismissing the complaint against him for lack of personal jurisdiction.

On all the records, files, and proceedings herein, on affidavits of the parties, on presentation of the Court by attorneys for the plaintiff of the application for registration bearing the signature of Raymond Johnson as owner of the aircraft, and on the allegation in the complaint indicating that Mr. Johnson did advise plaintiffs that the aircraft was "in

good and air worthy condition" and that the said Raymond Johnson did in fact pilot the aircraft and give a demonstration ride to the one plaintiff, Perry Schermerhorn, the court did therefore make the following as its findings:

1. That if the plaintiffs do prove their allegations, the same would show the commitment of an act outside the State of Minnesota causing injury or property damage in Minnesota.

2. That Minnesota should have a substantial interest in providing a forum.

3. That the action is against other defendants who are residents of the state and the state should have an interest in providing a forum between all of the parties.

4. That the burden placed on the defendant is very small, if any. That the defendant lives only approximately 150 miles from Detroit Lakes, Minnesota, the County seat of Becker County wherein the trial would take place. That it would be unfair and not just to plaintiff if required to try the lawsuit in the state of Minnesota and then to again bring the same lawsuit in the state of North Dakota against Raymond Johnson, defendant.

ORDER

Therefore, the court does hereby deny defendant Raymond Johnson's motion and does find that the defendant is subject to the jurisdiction of the court pursuant to the "Minnesota long arm statute" being Minnesota statute 543.19.

Date: October 18, 1982.

BY THE COURT:

/s/ Charles W. Kennedy

AFFIDAVIT OF RAYMOND JOHNSON

STATE OF NORTH DAKOTA

ss

COUNTY OF STUTSMAN

Raymond Johnson, being duly sworn, deposes and states as follows:

1. I, Raymond Johnson, defendant in this action, am a resident and citizen of the State of North Dakota.

2. I own no property in the State of Minnesota.

3. I have never had an ownership interest in the airplane that is the subject of plaintiff's complaint. I did have a mortgage on the airplane, which was reflected in my name being on the certificate of title. However, I had no authority to negotiate or sell the plane to the plaintiffs at any time.

4. In connection with the sale of the plane, my role was limited to showing it to the plaintiffs when they came to North Dakota to see it. I did this solely as a favor to Loren Nogosek and was not personally or financially involved in the sale of the aircraft. I engaged in no negotiations with plaintiffs about the airplane in North Dakota or anywhere else, and I never visited Minnesota or had any contact whatsoever with that state in connection with the sale of this airplane.

5. I have never had any contact with the plaintiffs of any nature or form, whether in person or by telephone or by letter, in the State of Minnesota.

6. I did not advertise, solicit a sale, or in any way engage another entity or agent in the State of Minnesota to market this airplane.

7. In short, I have had absolutely no contacts with these plaintiffs in the State of Minnesota or in connection with the sale of this airplane in the State of Minnesota.

/s/ RAYMOND JOHNSON

Subscribed to and sworn to before me this 17 day of September, 1982.

/s/ STANLEY WRIGHT
Notary Public

My commission expires: 6/17/87.

(SEAL)

AFFIDAVIT OF LOREN NOGOSAK

STATE OF NORTH DAKOTA)

ss

COUNTY OF

Loren Nogasak, being duly sworn, deposes and states as follows:

1. I, Loren Nogosak, am a defendant in this action.

2. I have read the affidavit submitted by Raymond Johnson in connection with his motion to dismiss for lack of personal jurisdiction and the statements made in it are true to the best of my knowledge and belief.

/s/ LOREN NOGOSAK

Subscribed to and sworn to before me this 17 day of September, 1982.

/s/ STANLEY WRIGHT
Notary Public

My commission expires: 6/17/87.

(SEAL)

AFFIDAVIT

STATE OF MINNESOTA

ss

COUNTY OF BECKER

COMES NOW Perry Schermerhorn, being first duly sworn under oath, deposes and says:

1. That approximately one week before the Schermerhorns bought the airplane from Mr. Johnson, a phone call was made to Mr. Johnson to see if he would be home on a Sunday and if he would show them the aircraft. Perry Schermerhorn, Jeff Schermerhorn, and Gene Schermerhorn drove out to his farm in North Dakota. Mr. Johnson apparently was not home, but someone, a relative or workman unknown to the affiant, showed them the aircraft on Mr. Johnson's farm.

2. On the following Wednesday, Jeff Schermerhorn and Perry Schermerhorn then went out and again met at the Johnson farm, this time with Mr. Johnson and Mr. Nogosak. Mr. Johnson then took Perry Schermerhorn up in the aircraft to show him how it worked and that it was in actual running condition.

3. While they were in the aircraft and when they were on the downwind leg before landing, Perry Schermerhorn asked Mr. Johnson if the aircraft was in good condition and whether or not it was airworthy. Mr. Johnson assured him that everything was all right and it was airworthy.

/s/ PERRY SCHERMERHORN

Subscribed and sworn to before me this 30th day of September, 1982.

/s/ R. W. IRVINE
Notary Public
Becker County, MN

My commission expires: 7/16/84.

STATE OF MINNESOTA
IN SUPREME COURT

No. 82-1509

RAYMOND JOHNSON,
Defendant-Appellant,

vs.

JEFF SCHERMERHORN and PERRY SCHERMERHORN,
Plaintiffs-Respondents.

AMENDED NOTICE OF APPEAL

Raymond Johnson hereby appeals to the United States Supreme Court from the judgment issued and entered by the Minnesota Supreme Court on August 26, 1983, affirming the constitutionality, as applied, of Minn. Stat. §543.19 (1982) (the Minnesota Long-Arm Statute). In doing so, the Minnesota Supreme Court applied Rule 12.02 of the Minnesota Rules of Civil Procedure, in an unconstitutional manner as well. This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: November 15, 1983.

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Office - Supreme Court, U.S.
FILED
FEB 15 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-880

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

RAYMOND JOHNSON,
Defendant-Appellant,

vs.

JEFF SCHERMERHORN and PERRY SCHERMERHORN,

Plaintiffs-Appellees.

MOTION TO DISMISS APPEAL

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IN THE

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Plaintiffs-Appellees.

MOTION TO DISMISS APPEAL

Appellees move the Court for an order dismissing the appeal of Appellant Raymond Johnson, pursuant to U.S. Sup. Ct. Rule 16. This motion is based upon all documents of record and the following Argument.

ARGUMENT

Appellant argues that the United States Supreme Court has jurisdiction to consider this appeal at this juncture pursuant to 28 U.S.C.A. §1257(2). To be eligible for review under that section, the decision appealed from must be in the category of "Final judgments or decrees rendered by the highest court of a State in which a decision could be had...". 28 U.S.C.A. §1257.

The decision appealed from in this case is the Minnesota Supreme Court's affirmation of the trial court's denial of Appellant's motion for dismissal. Appellant's unsuccessful motion alleged lack of jurisdiction over the person of Appellant.

Appellant contends that at the trial court level, Appellees failed to make a prima facie showing of sufficient jurisdictional facts. This contention is totally erroneous, as indicated by the opinion of the Minnesota Supreme Court, wherein is found the following:

> "...in the present posture of this case, defendant-appellant Johnson has the requisite "minimum contacts" with Minnesota to afford personal jurisdiction over him under our long arm statute. "It is clear that in reviewing the granting of motions [to dismiss] founded upon Rule 12(b), Federal Rules of Civil Procedure, the model for our Rule 12.02, allegations in the complaint must be taken as true." Hunt v. Nevada State Bank, 285 Minn. 77, 82, 172 N.W.2d 292, 296 (1969); see also Marquette National Bank of Minneapolis v. Norris, 270 N.W.2d 290 (Minn. 1978). In other words, at this juncture, we take as true that defendant Raymond Johnson was a co-owner of the plane with defendant

> Loren Nogosek, who at relevant times was a Minnesota resident, and that the negotiations for the sale of the airplane to Minnesota plaintiffs were initiated by defendant Johnson's co-owner in Minnesota. This case is unlike the car dealer in World-Wide Volkswagen who indiscriminately sells cars that are likely to find their way to any place in the country. Here the plaintiffs have alleged facts that, if true, show that defendant Johnson purposely availed himself, through his co-owner, of the privilege of conducting activities within Minnesota. It may be that at trial plaintiffs will not be able to prove their allegations of the requisite minimal contacts with Minnesota, but they must be given that opportunity; the trial court was correct in denying the motion to dismiss.
> Affirmed."

Appellant has offered no authority or convincing argument that the State Courts were wrong in taking as true the allegations of the complaint for purposes of ruling on appellant's motion.

It should be noted that Appellant was apparently satisfied with allowing the trial court to use that approach, for they did not seek an evidentiary hearing involving testimony. At such a hearing the court could have considered the veracity of the witnesses making the allegations. Instead, Appellant merely submitted an affidavit which amounted to a simple denial of the allegations of Appellee's complaint. The information provided by Appellant was not sufficient to establish that Appellee's complaint was inherently incredible. Under these circumstances, Appellant must be deemed to have waived any objection to the state courts' method of decision- making, and the findings of the state courts must not be disturbed.

The United States Supreme Court has previously stated that denial of motions such as Appellant's are not immediately reviewable. In Catlin v. United States, the Court stated:

> "But denial of a motion to dismiss, even when the motion is based upon jurisdictional grounds, is not immediately reviewable. (cites omitted). Certainly this is true whenever the question may be saved for disposition upon review of final judgment disposing of all issues involved in the litigation or in some other adequate manner."

Catlin v. United States, 324 U.S. 229, 236, 65 S.Ct. 631, 635. The reason for the rule is to eliminate piecemeal litigation, conserve judicial resources, and eliminate delays caused by interlocutory appeals. Id.

Critical to any discussion of the doctrine of due process is the question

of fairness of actions proposed or taken. Appellant argued, to the satisfaction of the Minnesota Supreme Court, that trial convenience is not a "contact" with the proposed forum. However, to expand upon the decision of the trial court, the bur den imposed upon Appellant in proceeding to trial in the neighboring State of Minnesota is not nearly so great as the burden, imposed upon Appellees and the other parties awaiting the outcome of protracted appeals, from interlocutory orders. The alternative of requiring Appellees to institute a separate action in North Dakota against only Appellant would result in even greater expense and inconvenience to the parties, would be a waste of judicial resources, and would lead to the undesirable possibility of

inconsistent verdicts in the separate jurisdictions.

The decision of the Minnesota Supreme Court is not final within the context of 28 U.S.C.A. §1257. It is clear from reading that Court's opinion that appellees must bear the burden of proving their allegations at trial. If appellant feels that appellees have not met that burden of proof at trial, he could renew his motion to dismiss at that time.

Conclusion

The decision appealed from is not a final judgment or decree, and thus should not be appealable under 28 U.S.C.A. §1257. Appellant has not shown that his opportunity for meaningful review will be denied unless he is permitted immediate review. Allowing the appeal to

proceed at this time will result in increased expense and inconvenience to all of the parties, will overtax judicial resources, and will unnecessarily delay resolution of claims. On the other hand, dismissing this appeal will not result in substantial unfairness to Appellant. This appeal should be dismissed.

Respectfully submitted,

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